

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Jeffrey A. Gair,

Petitioner,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

v.

Hennepin County,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 2, 1997, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The record closed upon adjournment of the hearing that day.

Jeffrey A. Gair, 1453 97th Avenue N.W., Coon Rapids, Minnesota 55433, appeared on his own behalf. Steve Hoffmeyer, Labor Relations Representative, Human Resources and Employee Relations Department, A-400 Government Center, Minneapolis, Minnesota 55487-0040, appeared on behalf of Respondent Hennepin County.

NOTICE

This Report is a recommendation, **not** a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner of Veterans Affairs, 200 Veterans Service Building, 20 West 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether Respondent has continued to pay Petitioner his full compensation and benefits pending a final determination in his veterans preference removal hearing.

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Petitioner was honorably discharged from the United States Air Force on August 14, 1970, after four years of active duty. Ex. 1.

Petitioner was employed October 4, 1976, by the Office of the Public Defender, Hennepin County. Stipulation of the Parties.

When Petitioner was first hired by the County, his position was funded through a grant program for almost three years. According to normal practice, he was not counted as a regular County employee until July 16, 1979.

On April 17, 1997, Petitioner was suspended with pay pending an internal investigation.

By letter of June 17, 1997, the Administrator of the Office of the Public Defender notified Petitioner of Respondent's intent to dismiss him from employment "for misconduct and/or gross misconduct." Letter of Dismissal attached to the Notice of Petition and Order for Hearing. The Letter of Dismissal notified Petitioner of several rights, including his right to a veterans preference hearing before the Hennepin County Human Resources Board under the Veterans Preference Act, Minn. Stat. § 197.46. Petitioner properly requested such a hearing ("the veterans preference removal hearing"), which is scheduled to be heard before Administrative Law Judge Jon L. Lunde for the Human Resources Board commencing November 4, 1997.

Respondent has not allowed Petitioner to work pending the outcome of the veterans preference removal hearing, but has placed him on leave with pay, and continued to pay his full salary. It has also continued his benefits, except for vacation accumulation as described in the following Findings. Ex. 6.

Hennepin County Human Resources Rule 12.6 governs leaves of absence with pay. It provides, in part, that, "Accrual of vacation leave and sick leave during the period of leave of absence with pay shall continue." Ex. 7.

Human Resources Rule 12.7 governs vacation leave. Section 12.7b provides that employees with more than 12 years, but less than 18 years, of employment accumulate vacation at the rate of 20 days per year. Employees over 18 years accumulate vacation at the rate of 22 days per year. Ex. 3. Multiplying those rates by 8 hours per day and dividing by 26 pay periods per year equates to approximately 6.154 hours per pay period and 6.769 hours per pay period, respectively. The Collective Bargaining Agreement covering Petitioner's position has the same provision. Ex. 4.

Human Resources Rule 12.7c provides that vacation may be accumulated to a maximum of 30 days (240 hours). Ex. 3. The Collective Bargaining Agreement covering Petitioner's position has the same provision. Ex. 4.

It is the uniform practice of the County, in accordance with Human Resources Rule 12.7c and the Collective Bargaining Agreements, to limit accumulation of vacation time to 240 hours for all employees. Testimony of Office Administrator John Pederson; Exs. 8 and 9. Such accumulations are automatically limited by the County's computer program that prepares the payroll and without any action by the employing department. Testimony of Pederson.

Petitioner's payroll stubs show that he was credited with vacation leave of 6.154 hours per pay period (or 20 days per year) through the pay period ending June 21, 1997. For the following pay period ending July 5, 1997, his vacation leave rate was listed as 22 days per year, but he was still credited with 6.153 hours of vacation leave for the pay period. It was during this pay period that he reached the total number of hours required to be counted as having 18 years of employment with the County. That change was actually implemented in the following pay period, which ended July 19, 1997, when he was credited with 6.769 hours of vacation leave. That brought his accumulated vacation to 238.953 hours. For the following pay period ending August 2, 1997, he was credited with 1.047 hours of vacation, bringing his vacation leave balance to 240.000 hours. Since that time, he has not been credited with any additional vacation leave. Ex. 6.

If Petitioner were to be allowed to continue accumulating vacation leave, he would receive 6.769 hours per pay period. Petitioner's hourly pay rate is \$25.154. Thus, the current value of his vacation leave allowance is \$170.27 per pay period.

It is the practice of the County that employees are paid the dollar value of their accumulated vacation leave upon termination of employment, but only upon such termination. County employees are not otherwise allowed to cash out accumulated vacation leave. Testimony of Pederson.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. Petitioner is an honorably discharged veteran entitled to the protections of Minn. Stat. § 197.46, the Veterans Preference Act.

3. The limitation of the accumulation of Petitioner's vacation leave to 240 hours was done in accordance with existing rules and uniformly applied policy. It was applied to Petitioner the same as it would have been had he not been subject to a disciplinary action. Petitioner has not been denied any vacation leave benefits to which is entitled or would have been entitled had he continued in regular employment.

4. Capping Petitioner's accumulated vacation leave at the properly adopted and uniformly applied maximum of 240 hours does not deny Petitioner any rights to which he is entitled under the Veterans Preference Act.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Veterans Affairs order that the petition of Jeffrey A. Gair be DENIED.

Dated this 10th day of October 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded,
not transcribed.
Two tapes.

MEMORANDUM

Under the Veterans Preference Act, a veteran is entitled to compensation until he is formally discharged in accordance with the Act. ***Pawelk v. Camden Township***, 415 N.W.2d 47 (Minn. App. 1987); ***Henry v. Metropolitan Waste Control Commission***, 401 N.W.2d 401 (Minn. App. 1987); ***Johnson v. Village of Cohasset***, 263 Minn. 425, 116 N.W.2d 692 (1962). However, a veteran is only entitled to "retain his position, not improve it," pending the completion of the discharge proceedings. ***Lewis v. Minneapolis Board of Education***, 408 N.W.2d 905 (Minn. App. 1987); ***Myers v. City of Oakdale***, 465 N.W.2d 702 (Minn. App. 1991) rev. denied (Minn., April 18, 1991).

Petitioner argues that since being placed on leave with pay pending the outcome of the veterans preference removal hearing, his compensation has been reduced by the amount of vacation leave he is no longer receiving. Thus, he argues, his veterans preference rights have been denied. However, failure to be given benefits to which you are not entitled cannot be considered a denial of benefits. Petitioner reached the vacation accumulation cap, and is not entitled to accumulate any additional vacation. He is not being singled out or in any way being treated differently than any other employee of the County. If he were allowed to accumulate additional vacation, he would be receiving greater benefits than any other County employee. If he were allowed to cash out some vacation, he would be receiving greater benefits than any other County employee.

Petitioner seems to suggest that if he were still working, he would be able to take vacation and thus not lose those additional vacation hours. But, in theory, Petitioner could ask to take vacation leave now while on leave with pay. That would reduce his vacation leave balance and he could accumulate more vacation again. However, his vacation leave balance would then be something less than 240 hours and Petitioner would be worse off than he is now.

Petitioner argues that Human Resources Rule 12.6 requires that he be allowed to continue accruing vacation leave. That rule provides that accrual of vacation leave shall continue during leaves of absence with pay. But that rule must be read in concert with Rule 12.7, which governs vacation leave. Rule 12.6 means that **normal** accrual of vacation leave shall continue, and normal accrual of vacation leave is capped at 240 hours.

Petitioner also argues that he should have been entitled to accrue vacation at the rate of 22 hours per year beginning 18 years after his original hire date, not 18 years after he was no longer being paid by a grant program. That

issue is not relevant to Petitioner's removal and the continuation of his benefits pending the veterans preference removal hearing. Even if it were, it would only mean that he would have reached the 240 hour cap at some earlier point. There would be no difference in the benefits he is entitled to at this point.

The County has recognized Petitioner's rights as a veteran by affording him the hearing he has requested and by continuing his pay and benefits pending the outcome of the hearing. No veterans preference rights have been denied and, therefore, his petition must be denied.

S.M.M.